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ABSTRACT

Sexual harassment complaints are challenges to the abuse of power in certain kinds of communicative relationships, and sexual harassment policies and procedures are ways of defining the responsible exercise of power and providing the means to address grievances that result from irresponsible and potentially harmful uses of power in those relationships. Harassment in colleges and universities can be particularly abusive, especially in relationships between faculty and students, because of the special character of trust and dependency that exists. Procedural fairness for all parties to a complaint can be assured if guidelines are developed; distributed and communicated widely among faculty, staff, and students; and training takes place. The guidelines should include both formal and informal remedies. Informal communicative remedies work best where the desired outcome is simply to bring the harassment to an end, and not necessarily to punish or expose those accused of harassment. Informal remedies such as mediation, counseling, or facilitated communication among the parties involved often deserve greater consideration either as part of or as alternatives to formal and legal remedies such as filing an appeal. Harassment situations are further complicated by nonhierarchical power relationships (such as harassment between students), resistance to the legitimacy of sexual harassment complaints, and the issue of consensual relationships. (JDD)

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UNIVERSITY POLICIES AND PROCEDURES ON SEXUAL HARASSMENT

Jerilyn S. McIntyre

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Let's start with a simple premise: sexual harassment complaints are challenges to the abuse of power in certain kinds of communicative relationships; sexual harassment policies and procedures are ways of defining the responsible exercise of power and providing the means to address grievances that result from irresponsible and potentially harmful uses of power in those relationships.

Harassment can be particularly abusive in the academy--especially in relationships between faculty and students--because of the special character of trust and dependency that exists in those situations.

It is a truism that teachers exercise power over students in classroom and in their other teaching and learning interactions. Through grades, they have great influence on the course of students' academic careers and their other post-graduation aspirations. Letters of reference or other ways of evaluating and encouraging students have similar impact on their lives and their personal and professional well-being. So, how can that special relationship be maintained without allowing the power differential to lead to abuse or distrust?

In most academic situations, expectations are communicated in a variety of ways between or among individuals. Those expectations form a kind of contract. Thus, syllabuses, class assignments, and lessons, department or university catalogs, student and faculty handbooks and so forth are all statements of what is expected between faculty and students; they define the formal relationship of power between teachers and learners and typically spell out, as well, the ways in which behaviors may or may not meet those defined expectations

Similarly, in other kinds of academic relationships--between faculty and staff, between senior faculty and junior faculty, senior staff

and junior, and between academic administrators and faculty, staff and students--the expectations stemming from or affected by power differentials existing in them, should be comunicated in some way, if the formal structure of remedies for abuse of them is to be effectively invoked. The obvious expectations or contracts in these relationships are articulated in such things as retention, promotion and tenure guidelines, performance reviews and employment evaluations.

Written expectations are relevant to sexual harassment complainst in two ways. First, the kinds of "contracts" described above provide the objective standards by which individual performances will be judged in specific situations, and make it clear that those performance criteria are the same for all individuals in the same category of evaluation; in so doing, they should leave no doubt that individual favors will not affect the evaluation process. Second, the importance of explicit expectations and standards of conduct applies to sexual harassment policies and procedures themselves. They, too, should be in writing and widely available, both to those who wish to file a complaint, and to those who are charged with harassment.

The discussion which follows will describe briefly some of the considerations in laying out both the written policy governing sexual harassment on a campus as well as in establishing a formal structure of remedies that can be invoked when those policies are violated. At the same time, it will briefly acknowledge and discuss the implications stemming from the fact that there are some relationships where the power differential is not hierarchical. Harassment between students, for example, or instances where informal social structures or ideologies create different kinds of power relationships and potentials for abuse.

And it will touch briefly on some of the resentment currently being expressed about this rather sensitive area of policy.

On my campus, we have been in the midst of a review of grievance policies and procedures for several years, attempting to streamline and consolidate the different avenues for hearing complaints. More recently, a committee of the University's Equal Opportunity Commission has focused its attention specifically on revising sexual harassment policies and drafting a policy on consensual relationships.

It is a fair observation that both review processes found it easier to describe hierarchical issues and formal structures for addressing grievances. And yet, in both processes, the committees undertaking the reviews found a great deal of appeal in more informal procedures--particularly in mediation and other ways of facilitating communication between parties to a complaint.

It is probably the case that harassment developing out of hierarchical relationships is better defined and perhaps better understood, and the remedies for it are more easily anchored in legal precedent and principles. In a campus context, this means that, if an institution can make clear how complaints will be handled--who is responsible for distributing information about harassment, to whom complaints are made, and what is the line of appeal until the last administrative remedy is exhausted--procedural fairness (that is, due process) for all parties to a complaint can be assured.

There are a number of very helpful guides to drafting policies and establishing the appropriate administrative remedies for complaints.[1]

[1]The Educator's Guide to Controlling Sexual Harassment , Thompson Publishing Group, September, 1993. is a particularly helpful compendium of materials on all aspects of sexual harassment policies. See especially "Specific Elements to Include in a Policy," Tab 400, pp. 22-34.

And legal precedent and case law have given some clarity to the issue as well.[2]

What, for example, is sexual harassment? A definition developed by the Equal Employment Opportunity Commission in 1984 has been a standard reference in subsequent case law, and is worth quoting:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
>
> 1. submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment;
>
> 2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual;
>
> 3. such conduct has the purpose or effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile or offensive workng environment.

The first two conditions contitute quid pro quo harassment and the third condition,

hostile environment harassment.

A summary of the elements of harassment in the Educator's Guide to Controlling Sexual Harassment suggests that it exists if the behavior involved (a) is unwanted or unwelcome; (b) is sexual or related to the sex or gender of the individual who is victimzed; and (c) occurs in the context of a relationship where one person has more formal power than another (that is, hierarchial power, typically) or more informal power.[3]

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[2] A useful summary of the earlier case law is Elsa Kircher Cole, "Recent Legal Developments in Sexual Harassment," Journal of College and University Law(1986), pp. 267-284.

[3] Educator's Guide, Tab 200, p. 4.

Statististics on the frequency of harassment vary, but it appears to be experienced by a sizable percentage of the population and is largely, though not entirely--and this is an important fact to remember--a complaint by women against men. Yet, it often goes unreported.[4] A recent Harris poll suggests it may also go somewhat undetected: a survey taken between February 2 and February 6, 1994 found that 63 per cent of the 782 individuals surveyed felt there was no sexual harassment where they were employed.[5] Earlier surveys indicate the number of incidents of harassment may be high, but fear of retaliation or a lack of faith in the possibility of addressing the problem may reduce the number of actual complaints filed. [6]

Perhaps one reason for the above survey results is that there is still not enough clarity about what constitutes the basis for a complaint. Quid pro quo harassment is probably reasonably well understood as inappropriate behavior. However, after more than a generation of legal precedent and policy development, there are still some ambiguities about hostile environment harassment.

What has been established is that harassment needn't be overtly sexual; that is, it can derive from--among other things--jokes, comments,

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[4] Both findings are cited in Elisabeth A. Keller, "Consensual Amorous Relationships Between Faculty and Students: The Constitutional Right to Privacy," Journal of College and University Law (1988), pp. 21-42.

[5]Quoted in the Deseret News, March 30, 1994, p. A2. In the survey, 18 per cent of both men and women who said they had been sexually harasssed at work, 31 per cent of women said they had been harassed, and 7 per cent of the men said they had; 16 per cent of whites, 25 per cent of African-Americans, and 25 per cent of Hispanics. However, of those who had been harassed, 62 per cent said they had taken no action.

[6]A good discussion of this disparity between incidents of harassment and the number of complaints filed, as well as of other issues related to harssment in the workplace is provided by Ronni Sandroff, "Sexual Harassment in the Fortune 500," Working Woman (December 1988(, pp. 69-73.

name-calling, flirting, rudeness and intimidation. [7] Recently , a court decision also provided guidance about whether or not psychological damage must be demonstrated by an individual in order to claim harassment. [8] And while early case law clarified an employer's liabilities when an employee has been charged with harassment, [9]there still is a need for better guidelines as to what constitutes due process for individuals and institutions.

An institution wishing to establish policies and procedures that protect the rights of all parties to a complaint should therefore study the policies of other institutions, or make use of the many sets of policy frameworks that are available, some of which are referenced in this article.

Once those guidelines are in place, however, it is crucial that they be distributed and communicated widely among faculty, staff and students. At the same time, it is equally important that there be some mechanism on campus to provide training sessions about what constitutes sexual harassment and what can be done to register complaints when harassment is believed to have occurred. In other words, the channels, not just for placing and processing complaints, but for providing training and information, must be clearly established and available.

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[7]A thorough general description is in the American Council on Education, "Sexual Harassment on Campus: A Policy and Program on Deterrence." (February, 1992).

[8]Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993).

[9]Guidance is offered in the classic case of Meritor Savings Bank, v. Vinson, 106 S.Ct. 2399 (1986).

In the remedies for harassment, both informal ways of resolving complaints (i.e., mediation and negotiation) should be provided, as well as formal channels. Regardless of which mechanism is chosen, however, confidentiality is esssential, as is some guarantee of due process appropriate to the method chosen, and reasonable standards of what constitutes evidence.

These kinds of remedies tend to work well with hierarchical power structures and relationships, because they are, in themselves, structurally based and hierarchical. But what about harassment occurring in the face of informal power differentials, or non-hierarchical, non-stereotypical situations? The increasing concern over date rape between students on college campuses suggests abuses of power in those otherwise hierarchically equal relationships.

Formal administrative remedies may help in some of these kinds of harassment situations but not always. In some cases, filing a formal appeal may make things worse--as is the case in harassment generally, which is probably why so many instances of harassment go unreported. In all such instances, mediation, counseling or other ways of facilitating communication among the parties involved in a complaint may be the best approach to a solution. They are certainly remedies deserving of greater consideration either as part of formal policies, or as alternatives to them.

Whether provided by an ombudsperson, or by individuals selected from a list of qualified mediators maintained by a specified office on a campus, mediation or dispute resolution may provide an extremely important service in getting accused harassers and their victims into a frame of mind where the issues can be brought to the surface and

confronted as part of a strategy of communication. [10]These informal procedures and communicative remedies work best where the desired outcome is to bring the harassment to an end, and not necessarily to punish or expose those accused of harassment.

Communicative remedies also have the potential of educating everyone in the complaint as to the abuse that occurs in a harassment situation. There are times when harassment is the result of ignorance or a lack of understanding about what constitutes a hostile working environment, and what constitutes inappropriate conduct in the workplace; in those situations, training and communication can help prevent situations from arising and help prevent them from being repeated.

This trust in the value of what I choose to call communicative remedies (as a counterpart to administrative or legal remedies) is anchored my belief that the education interaction is ultimately less of a gesellschaft relationship and more of a gemeinschaft one. Thus it is subject more readily to redress through the basic sense of community and interdependence of a teaching-learning environment, and through the communication systems that maintain such a community.

The potential efficacy of informal solutions acknowledges something that all administrators who hear harassment complaints know well--that formal administrative remedies, policies and procedures, and even legal remedies, are limited. They can only address the kinds of complaints that are amenable to structurally enforced or hierarchially

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[10]On the University of Utah campus, a certificate for training in dispute resolution by my Department of Communication colleagues Richard Rieke and Leonard Hawes has been obtained by a number of individuals in several administrative offices on campus. The knowledge they obtained from that program provides much of the basis for the confidence in informal grievance procedures manifested by various committees reviewing grievance mechanisms on campus.

based solutions. They can't be effective if structure is irrelevant as a condition giving rise to the problem (for example, if the harassment doesn't devolve from the abuse of hierarchical power) or ineffective as a mechanism for helping to solve the problem. And hierarchically enforced remedies needn't always be applied in those situations where the victim of harassment doesn't want punishment of the accused; that is, where she or he desires privacy or simply wants the harassment to stop.

But there's one other aspect of this issue that deserves comment. Despite the attention given to harassment as a civil rights issue--perhaps even because of that attention--there continues to be a great deal of resistance to the legitimacy of sexual harassment complaints, especially on grounds of the existence of a hostile environment. There is even evidence of a growing amount of backlash against that kind of grievance. The fact that behaviors constituting a hostile environment are still regarded by some as "harmless" and therefore unintentionally offensive may account for the findings of the recent Harris poll. Other, earlier, surveys have revealed a similar public sentiment in support of the notion that harassment is an exaggerated social problem.

David Mamet's 1992 play, Oleanna, dramatizes the worst fears of those who feel that sexual harassment complaints are, in themselves, another kind of harassment in the academy and the workplace, with its depiction of the abusive power exercised by a young woman student who accuses a male professor of harassing her. Michael Crichton's recent novel, Disclosure, also argues against the stereotype of the female as victim. Its plot, built on the intrigue resulting from a woman supervisor's

attempted seduction of one of her male employees, turns the problem of sexual harassment on its head through role reversal.

Another harassment-related issue is becoming particularly controversial. I mentioned above that, as part of the drafting of policies on harassment, there is increasing emphasis on the importance of mentioning consensual relationships as problematic, if not actually prohibited situations. Such campus rules on consensual relationships have attracted special wrath in some quarters.

In one of the more startling examinations of the issue, Harper's Magazine published a discussion in which campus regulations against student-faculty relationships were denounced as "a broad attempt to poison the first adult experience for many young people."[11] The sexual power relationship was almost therapeutic in the opinion of one of the participants in that discussion:

> 'I have been the subject of advances from male and female students for twenty-five years. I've had them come at me right and left. I'v e had people take their clothes off in my office. And there is a particular kind of student I have responded to. I am not defending Don Juanism, you know, sex for grades and so forth. But there is a kind of student I've come across in my career who was working through something that only a professor could help her with. I'm talking about a female student who, for one reason or another, has unnaturally prolonged her virginity....There have been times when this virginity has been presented to me as something that I, not quite another man, half an authority figure, can handle--a preciousness I realize...these relationships exist between adults and can be quite beautiful and genuinely transforming. It's very powerful sexually and psychologically, and because of that power, one can touch a student in a positive way. [12]

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[11]"New Rules About Sex on Campus, Harper's Magazine (September, 1993), p. 42.

[12]"New Rules," pp. 15-16.

The backlash inherent in such published reflections on sexual relationships was echoed in the comments I heard recently in responses to a panel on harassment and other grievances, where students' complaints were described as evidence of a "sick" society, and the definitions of hostile environment harassment were deplored as "the new McCarthyism."

What should be the response to these kinds of reactions to sexual harassment policies? It is tempting to fall back on the observation that there is no point in trying to make policy for irrational fears or deliberately contentious arguments, which some of these appear to be. Probably the most helpful response, however, is to understand that power is the the condition which fosters many of the abuses defined by sexual harassment policies, and it is power that feels threatened when those abuses are defined and proscribed. Under those circumstances, therefore, the best remedy is always to try to reduce the extent to which the exercise of power becomes the unquestioned and unquestionable, defining element in academic interactions. Educational institutions, after all, are at once communities as well as hierarchies. The trick is to make sure relationships within them are built on communication, trust and a sense of mutual dependence.

More often than not, the best policy is to maximize the ways we listen to each other, care about each other, and foster expression of the special kind of community we share. Opening up lines of communication, through either formal or informal grievance procedures,

will help make sure neither side to a complaint feels victimized or powerless.